

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
HENRY ZAPPIA
Petition for Reconsideration and Request to
Reinstate License for Business Radio Service
Station WNVW812, Rio Rico, Arizona
File No. 0000537217

ORDER ON RECONSIDERATION

Adopted: July 3, 2003

Released: July 7, 2003

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

1. Introduction. On June 5, 2002, Henry Zappia (Zappia) filed a petition for reconsideration of a May 6, 2002 decision by the Wireless Telecommunications Bureau, Public Safety and Private Wireless Division, Licensing and Technical Analysis Branch (LTAB) denying Zappia's November 21, 2001 motion to correct the Commission's records to identify Zappia as the licensee of conventional Business Radio Station WNVW812, Rio Rico, Arizona. For the reasons set forth below, we deny the petition for reconsideration. For administrative efficiency, we nonetheless give de novo review to his motion using all of the information currently before us in the record of this proceeding. Based on such review, we conclude that the requested relief should be granted.

2. Background. On October 25, 1996, the Commission renewed the license for Station WNVW812, with an expiration date of September 3, 2001. The station was licensed to Dale Eaton dba Arizona Two Way Communications (ATWC). ATWC was a partnership among Henry and Joanna Zappia and Dale R. Eaton (Eaton). On November 27, 2000, the Arizona Superior Court for Pima County dissolved the partnership, and ordered the distribution of the assets. The court awarded the license for Station WNVW812 to Zappia, and ordered Eaton to execute any documents necessary to transfer the license into Zappia's name by November 28, 2000. However, Eaton refused to participate in the filing of

1 Zappia Petition for Reconsideration (filed June 5, 2002) (Petition).
2 Letter dated May 6, 2002 from Mary M. Shultz, Chief, Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division to Benjamin J. Aron, Esq., Schwaninger & Associates, P.C., counsel for Zappia (Letter).
3 See Goosetown Enterprises, Inc., Memorandum Opinion and Order, 16 FCC Rcd 12792, 12794-95 ¶ 7 (2001) (Goosetown). In this regard, we note that Zappia could file a waiver request to submit a late-filed renewal and renewal application.
4 Zappia asserts that the station originally was licensed to Henry Zappia and Dale Eaton dba Arizona Two Way Communications, but sometime prior to or during the partnership dissolution proceedings, Eaton improperly changed the name on the license to omit Zappia's name. Petition at 2.
5 See Petition at Ex. 1 (Arizona Superior Court, Pima County, Case No. C325289, Minute Entry (Nov. 27, 2000)).
6 Id.
7 Id.

an assignment application.⁸

3. Consequently, on July 25, 2001, Zappia filed an application to modify the license for Station WNVW812 to list Zappia as the licensee.⁹ The application also sought to change, *inter alia*, the station class code and interconnection.¹⁰ The application did not request renewal of the license. On September 3, 2001, the license for Station WNVW812 expired by its own terms. Zappia states that he contacted the Commission on September 29, 2001 to determine how he could renew the license, and that Commission staff told him that the Commission would be willing to reinstate the license more than thirty days after the license expired¹¹ if he provided proof of the court's order awarding him the license.¹² On October 9, 2001, Zappia amended the modification application by attaching a copy of the court order, but he did not change the purpose of the application to request renewal.¹³ On October 16, 2001, LTAB dismissed the modification application because the requested station class code and interconnection were incompatible.¹⁴

4. On November 21, 2001, Zappia filed a motion to correct the Commission's records to show him as the licensee of Station WNVW812 and allow him to renew the license.¹⁵ On May 6, 2002, LTAB denied the motion.¹⁶ LTAB noted that the license would have expired even if the modification application had been granted, because Zappia never filed a renewal application.¹⁷ LTAB noted that Zappia could have requested renewal before the end of the thirty-day period following the license expiration date by amending the modification application to request renewal, filing a renewal application with a request for waiver of the signature requirement, or requesting correction of the Commission's records earlier.¹⁸ On June 5, 2002, Zappia filed a petition for reconsideration of LTAB's decision.

5. *Discussion.* Zappia argues that under the circumstances presented, LTAB should have granted his request to correct the Commission's records and allowed him to renew the license for Station WNVW812. We disagree. He appears to argue that his motion to correct the Commission's records should have been granted pursuant to the Commission's policy regarding treatment of late-filed renewal applications in the Wireless Radio Services.¹⁹ That policy is as follows: Renewal applications that are

⁸ Petition at 2.

⁹ FCC File No. 0000537217 (filed July 25, 2001, amended Oct. 9, 2001).

¹⁰ *Id.*

¹¹ As will be discussed in greater detail below, *see infra* para. 5, the Commission's policy regarding renewal applications filed after the expiration date of the authorization for which renewal is sought applies a stricter standard to applications filed more than thirty days late. *See* Biennial Regulatory Review – Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, and 101 of the Commission's Rules to Facilitate Development and Use of the Universal Licensing System in the Wireless Telecommunications Service, *Memorandum Opinion and Order on Reconsideration*, WT Docket No. 98-20, 14 FCC Rcd 11476, 11485 ¶ 22 (1999) (*ULS MO&O*).

¹² Petition at 3.

¹³ Zappia states that he mailed the material on October 4, 2001 by overnight delivery service. *Id.* at 3 n.3.

¹⁴ Dismissal Letter Ref. No. 1108913 (Oct. 16, 2001). Specifically, Zappia requested to modify the license to authorize interconnection to the public switched telephone network, and to change the station class code from FB4C to FB2, but the station class code for interconnected stations must end in C, J, K, or L.

¹⁵ Zappia Motion to Correct the Commission's Records (filed Nov. 21, 2001).

¹⁶ Letter at 1.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *See* Petition at 8.

filed up to thirty days after the expiration date of the license will be granted *nunc pro tunc* if the application is otherwise sufficient under our rules, but the licensee may be subject to an enforcement action for untimely filing and unauthorized operation during the time between the expiration of the license and the untimely renewal filing.²⁰ Applicants who file renewal applications more than thirty days after the license expiration date may also request that the license be renewed *nunc pro tunc*, but such requests will not be routinely granted, will be subject to stricter review, and also may be accompanied by enforcement action, including more significant fines or forfeitures.²¹ In determining whether to grant a late-filed renewal application, we take into consideration all of the facts and circumstances, including the length of the delay in filing, the reasons for the failure to timely file, the potential consequences to the public if the license should terminate, and the performance record of the licensee.²²

6. An initial requirement for grant of a late-filed renewal application is the filing of a renewal application pursuant to Section 1.949²³ of the Commission's Rules and a waiver request pursuant to Section 1.925²⁴ of the Commission's Rules. Zappia filed neither.²⁵ Consequently, we agree with LTAB that Zappia did not submit the materials necessary for the relief he now seeks. Because the license had expired, LTAB correctly denied Zappia's motion to correct the Commission's records. We therefore deny the petition for reconsideration.

7. Nonetheless, we note that Zappia could still file a renewal application and waiver request setting forth the information presented in his motion to correct the Commission's records and his petition for reconsideration. Accordingly, for reasons of administrative efficiency, we will consider the merits of such a waiver request on our own motion.²⁶ We agree with Zappia that the circumstances surrounding his license are sufficiently unique as to warrant a renewal *nunc pro tunc*.²⁷ On July 25, 2001, well before the license expired, Zappia took action to enable himself to renew the license. Based on the information before us, it appears that Zappia's inability to file a timely renewal application was not caused by any neglect on his part, but by Eaton's refusal to comply with the court order. But for Eaton's intransigence,

²⁰ See *ULS MO&O*, 14 FCC Rcd at 11486 ¶ 22.

²¹ See *id.*

²² See *id.* at 11485 ¶ 22.

²³ 47 C.F.R. § 1.949.

²⁴ 47 C.F.R. § 1.925.

²⁵ Indeed, Zappia now concedes that, in retrospect, he should have taken one of the actions mentioned in LTAB's May 6, 2002 letter. Petition at 5. He implies that he should not be penalized for not having done so because Commission staff did not instruct him to do so during the September 29, 2001 telephone call. *Id.* at 7. First, on the record before us, we cannot find that Zappia received inaccurate information, for we do not know the context of the conversation, and whether the conversation was about renewal or modification, or both subjects. Moreover, even assuming *arguendo* that the Commission staff to whom Zappia spoke did not mention the need to request renewal of the license, this argument is unavailing, for it is settled that inaccurate informal advice from Commission employees does not relieve a licensee from meeting Commission regulations. See, e.g., Mary Ann Salvatoriello, *Memorandum Opinion and Order*, 6 FCC Rcd 4705, 4708 ¶ 22 (1991) ("Erroneous advice received from a government employee is insufficient [to warrant estoppel against the government], particularly when the relief requested would be contrary to an applicable statute or rule."); Texas Media Group, Inc., *Memorandum Opinion and Order*, 5 FCC Rcd 2851, 2852 ¶ 8 (1990) ("It is the obligation of interested parties to ascertain facts from official Commission records and files and not rely on statements or informal opinions by staff."), *aff'd sub nom. Malkan FM Associates v. FCC*, 935 F.2d 1313 (D.C. Cir. 1991); Hinton Telephone Company, *Memorandum Opinion and Order on Reconsideration*, 10 FCC Rcd 11625, 11637 (1995) ("The Commission has specifically held that parties who rely on staff advice or interpretations do so at their own risk.").

²⁶ See *Goosetown*, 16 FCC Rcd at 12794-95 ¶ 7.

²⁷ See Petition at 8.

it is clear the Zappia would have renewed the license in a timely manner. Accordingly, we grant Zappia a waiver to submit a late-filed renewal application.²⁸

8. *Ordering Clauses.* Accordingly, IT IS ORDERED that, pursuant to Section 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the Petition for Reconsideration filed by Henry Zappia on June 5, 2002 IS DENIED.

9. IT IS FURTHER ORDERED that Henry Zappia is hereby granted a waiver of Section 1.949(a) of the Commission's Rules, 47 C.F.R. § 1.949(a), and is, thus, permitted to file a renewal application for Station WNVW812, Rio Rico, Arizona. This waiver is CONDITIONED on Zappia submitting both assignment and renewal applications within sixty days of release of this *Order on Reconsideration*. Any renewal application filed after such time will be dismissed as untimely.

10. IT IS FURTHER ORDERED that the Public Safety and Private Wireless Division, Licensing and Technical Analysis Branch SHALL PROCESS such applications in accordance with the waiver granted in this *Order on Reconsideration* and the applicable Commission rules and policies.

11. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry
Chief, Public Safety and Private Wireless Division
Wireless Telecommunications Bureau

²⁸ In order to be able to file a renewal application, Zappia should concurrently file an application to involuntarily assign the license to himself. Although assignment applications generally must be filed with the participation of the licensee of record, 47 C.F.R. § 1.948(a), there is ample precedent for the Commission to accept and process an application for an involuntary assignment of a license without the acquiescence of the licensee of record in exceptional circumstances when doing so will accommodate a court decision that does not infringe on the Commission's jurisdiction. *See, e.g.,* TV Active, LCC, *Order on Reconsideration*, 16 FCC Rcd 18938, 18945-46 ¶¶ 17-20 (WTB PSPWD 2001), and cases cited therein. In *Arecibo Radio Corporation, Memorandum Opinion and Order*, 101 FCC 2d 545 (1985), for example, applications for involuntary assignment of two broadcast licenses from the licensee to a third party were signed, pursuant to court directive, by the Marshall of the Superior Court of Puerto Rico, rather than by an officer of the licensee. The Commission approved the assignments, rejecting the licensee's contention that a license may be assigned without the incumbent licensee's consent only when the incumbent licensee is legally disabled from holding the license. The Commission held that, given its policy of deferring to a court with respect to matters within the court's jurisdiction, it was proper to accept and process the assignment applications under the Marshall's signature since the licensee, in refusing to sign the applications, was defying the court. *Id.* at 549 n.12. Similarly, given that the Arizona Superior Court awarded the license for Station WNVW812 to Zappia, we believe it is appropriate to permit Zappia to file an application to assign the license to himself, notwithstanding Eaton's refusal to participate in the filing of an assignment application.